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Mohd Toufic Ozeir (also known as Dato' Sri Mohamad Toufic Al-Ozeir) v Desa Hatchery Sdn Bhd

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-03(IM)-98–02 OF 2013
MOHD HISHAMUDIN, LIM YEE LAN AND MOHD ZAWAWI SALLEH JJCA
16 JUNE 2014

Bankruptcy — Act of bankruptcy — Judgment debt — Judgment creditor filed suit against judgment debtor as guarantors — Permanent Secretary of Ministry of Finance of Sabah wrote to judgment creditor not to proceed with ongoing bankruptcy proceedings against judgment debtor — No further action by judgment creditor — Fresh bankruptcy notice taken out by judgment creditor against judgment debtor three years later — Application to set aside second bankruptcy notice — Deputy registrar dismissed application to set aside second bankruptcy notice — Appeal to High Court dismissed — Whether decision of deputy registrar seriously flawed by reason of breach of rules of natural justice for failing to hear application on merits before making decision — Whether second bankruptcy notice amounted to abuse of process of court

The respondent ('the judgment creditor') was wholly-owned by the State Government of Sabah by virtue of the fact that its shareholders comprised a company called Desa Lestari Sdn Bhd and the State Government of Sabah. Desa Lestari Sdn Bhd, in turn, was wholly owned by the State Government of Sabah. Sometime in 1984, the judgment creditor had entered into a contract with a company known as Kokomewah Sdn Bhd ('the principal debtor') for the construction of a hatchery. The judgment debtor and one Hadijah bt Harris ('Hadijah') stood as guarantors. However, the contract was terminated in 1985. The judgment creditor then filed a suit against the judgment debtor and Hadijah. On 29 July 1998 summary judgment was entered by the deputy registrar ('DR') against the judgment debtor for the sum of RM3,700,000. The judgment debtor filed an appeal to the judge in chambers and the appeal was dismissed by the judge but the judgment sum was varied and reduced to RM2,072,046.11. The judgment creditor then took out a bankruptcy notice against the judgment debtor ('the first bankruptcy proceedings'). The judgment debtor applied to set aside the bankruptcy notice but was unsuccessful as the application was dismissed by the DR and an appeal to the judge in chambers was similarly dismissed. The permanent secretary of the Ministry of Finance of Sabah wrote to the judgment creditor directing the judgment creditor not to proceed with the ongoing bankruptcy proceedings against the judgment debtor. The decision not to proceed with the bankruptcy

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proceeding by both the State Government of Sabah and the judgment creditor was within the knowledge of the judgment debtor; and the judgment creditor knew of the judgment debtor's knowledge. Thus, no further action was taken by the judgment creditor. However, some three and a half years later, a fresh bankruptcy notice ('the second bankruptcy notice') was taken out by the judgment creditor against the judgment debtor. The judgment debtor then filed a summons in chambers (encl 4) to set aside the second bankruptcy notice. The DR not only decided on the preliminary objection, but proceeded to dismiss the judgment debtor's application to set aside encl 4 without hearing it on merits. The judgment debtor filed an appeal to the judge in chambers in the High Court against the decision of DR in dismissing the application to set aside the second bankruptcy notice but the appeal was dismissed. In the present appeal the judgment debtor argued that the decision of the DR was seriously flawed by reason of a breach of the rules of natural justice for failing to hear the application on merits before making his decision; and that the second bankruptcy notice filed by the judgment creditor amounted to an abuse of process of the court since the judgment creditor had earlier made a decision not to proceed with the first bankruptcy proceedings.

Held, allowing appeal with costs of RM10,000:

(1) The failure on the part of the DR to accord parties the right to be heard before him amounted to a fundamental breach of rules of natural justice. The hearing of the application to set aside the second bankruptcy notice before the learned DR was procedurally flawed as the DR should have allowed learned counsel for the judgment debtor to submit orally, despite the fact that parties had filed their written submissions. It is the rule of law that parties in a court proceedings have the right to be heard before a deliberation is made. Even when written submissions have been filed, the judgment debtor still has a right to be heard orally. Instead, without hearing arguments by either party, the DR proceeded to deliver his decision on the application to set aside the second bankruptcy notice. The DR's action amounted to a gross procedurally impropriety and a blatant disregard of the rules (see paras 27–28).

(2) The decision of the DR on the application to set aside the second bankruptcy notice as procedurally flawed and must be set aside. The failure of the DR to accord an oral hearing to the judgment debtor was not curable as the appeal before the judge was by way of a re-hearing. Whilst the appeal before the judge was by way of a re-hearing, it did not mean that there need not be a hearing before the DR. To deny the parties the right to argue before the DR would in essence mean that the parties would be deprived of one level of hearing before the court. Such a practice was procedurally flawed and could not be condoned by the court (see paras 30–31).

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(3) The High Court judge erred in law in ignoring the complaint of the judgment debtor that the parties before the DR were denied the right to make oral submissions on the merits of the setting aside application. The High Court judge should have entertained the complaint, and should have ordered that the matter be sent back to the DR for oral submission on the merits. Since the matter began at the DR's level, the judgment debtor was entitled to a full and proper hearing before the DR. Such a right should not have been denied (see para 32).

(4) It was clear that after the letter by the Permanent Secretary of the Ministry of Finance, Sabah, the judgment creditor had instructed that the first bankruptcy proceedings be discontinued and the judgment creditor had duly complied with the State Government's instruction. For almost three and a half years, the judgment creditor did not initiate any further bankruptcy proceedings against the judgment debtor. The conduct of the judgment creditor in not proceeding with the bankruptcy matter against the judgment debtor in compliance with the instruction from the Permanent Secretary was a clear indication by the judgment creditor that it had put a finality to the bankruptcy proceedings against the judgment debtor and this meant that the judgment debtor was now entitled to conduct his personal affairs accordingly, without having to worry of the threat of the bankruptcy proceedings (see paras 35–36).

[Bahasa Malaysia summary

Responden ('pemiutang penghakiman') adalah milik penuh Kerajaan Negeri Sabah menurut fakta bahawa pemegang sahamnya terdiri daripada syarikat bernama Desa Lestari Sdn Bhd dan Kerajaan Negeri Sabah. Desa Lestari Sdn Bhd, sebaliknya, adalah milik penuh Kerajaan Negeri Sabah. Sekitar tahun 1984, pemiutang penghakiman telah memasuki kontrak dengan syarikat yang dikenali sebagai Kokomewah Sdn Bhd ('penghutang utama') untuk pembinaan pusat penetasan. Penghutang penghakiman dan Hadijah bt Haris ('Hadijah') merupakan penjamin-penjamin. Walau bagaimanapun, kontrak itu telah ditamatkan pada 1985. Pemiutang penghakiman kemudian telah memfailkan guaman terhadap penghutang penghakiman dan Hadijah. Pada 29 Julai 1998 penghakiman terus telah dimasuki oleh timbalan pendaftar ('TP') terhadap penghutang penghakiman untuk jumlah RM3,700,000. Penghutang penghakiman telah memfailkan rayuan kepada hakim dalam kamar dan rayuan itu telah ditolak oleh hakim itu tetapi jumlah penghakiman telah diubah dan dikurangkan kepada RM2,072,046.11. Pemiutang penghakiman kemudian telah mengeluarkan notis kebankrapan terhadap penghutang penghakiman ('prosiding kebangkrapan pertama'). Pemiutang penghakiman telah memohon agar notis kebankrapan diketepikan tetapi tidak berjaya kerana permohonan itu telah ditolak oleh TP dan rayuan kepada hakim dalam kamar juga telah ditolak. Setiausaha Tetap Kementerian Kewangan Sabah telah menulis kepada pemiutang penghakiman mengarahkan

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pemiutang penghakiman tidak meneruskan dengan prosiding kebankrapan yang sedang berjalan terhadap penghutang penghakiman. Keputusan untuk tidak meneruskan dengan prosiding kebankrapan oleh kedua-dua Kerajaan Negeri Sabah dan Pemiutang penghakiman adalah dalam pengetahuan penghutang penghakiman; dan pemiutang penghakiman mengetahui tentang pengetahuan penghutang penghakiman itu. Oleh itu, tiada tindakan lanjut telah diambil oleh pemiutang penghakiman. Walau bagaimanapun, lebih kurang tiga tahun setengah kemudian, satu notis kebankrapan baru ('notis kebankrapan kedua') telah dikeluarkan oleh pemiutang penghakiman terhadap penghutang penghakiman. Penghutang penghakiman kemudian telah memfailkan saman dalam kamar (lampiran 4) untuk mengetepikan notis kebankrapan kedua. TP bukan sahaja memutuskan atas bantahan awal, tetapi telah terus menolak permohonan penghutang penghakiman untuk mengetepikan lampiran 4 tanpa mendengarnya atas merit. Penghutang penghakiman telah memfailkan rayuan kepada hakim dalam kamar di Mahkamah Tinggi terhadap keputusan TP yang menolak permohonan untuk mengetepikan notis kebankrapan kedua itu tetapi rayuan itu telah ditolak. Dalam rayuan ini penghutang penghakiman berhujah bahawa keputusan TP itu telah cacat dengan serius disebabkan pelanggaran rukun keadilan asasi kerana gagal mendengar permohonan itu atas merit sebelum membuat keputusan beliau; dan bahawa notis kebankrapan kedua itu yang difailkan oleh pemiutang penghakiman merupakan penyalahgunaan proses mahkamah kerana pemiutang penghakiman telahpun sebelum itu membuat keputusan untuk tidak meneruskan dengan prosiding kebankrapan pertama.

Diputuskan, membenarkan rayuan dengan kos sebanyak RM10,000:

(1) Kegagalan di pihak TP untuk memberikan pihak-pihak hak untuk didengar di hadapan beliau merupakan pelanggaran asas rukun keadilan asasi. Perbicaraan berhubung permohonan untuk mengetepikan notis kebankrapan kedua di hadapan TP itu secara prosedur adalah cacat kerana TP itu patut membenarkan peguam bijaksana bagi pihak penghutang penghakiman mengemukakan secara lisan, meskipun pada hakikatnya pihak-pihak telah memfailkan penghujahan bertulis mereka. Adalah rukun undang-undang bahawa pihak-pihak dalam prosiding mahkamah mempunyai hak untuk didengar sebelum pertimbangan dibuat. Bahkan apabila penghujahan bertulis telah difailkan, penghutang penghakiman masih mempunyai hak untuk didengar secara lisan. Sebaliknya, tanpa hujah-hujah perbicaraan oleh mana-mana pihak, TP telah terus menyampaikan keputusan beliau tentang permohonan untuk mengetepikan notis kebankrapan kedua itu. Tindakan TP itu merupakan ketidakwajaran prosedur yang nyata dan terang-terangan mengabaikan peraturan-peraturan itu (lihat perenggan 27–28).

(2) Keputusan TP berhubung permohonan untuk mengetepikan notis kebankrapan kedua sebagai ketidakwajaran prosedur dan patut

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diketepikan. Kegagalan TP untuk memberikan perbicaraan lisan kepada penghutang penghakiman tidak boleh dipulihkan kerana rayuan di hadapan hakim adalah melalui perbicaraan semula. Di mana rayuan di hadapan hakim adalah melalui perbicaraan semula, ia tidak bermaksud bahawa tidak perlu ada perbicaraan di hadapan TP. Untuk menafikan pihak-pihak hak untuk berhujah di hadapan TP bermaksud bahawa pihak-pihak dinafikan satu peringkat perbicaraan di hadapan mahkamah. Amalan sedemikian merupakan ketidakwajaran prosedur dan tidak boleh dibiarkan oleh mahkamah (lihat perenggan 30–31).

(3) Hakim Mahkamah Tinggi terkhilaf dari segi undang-undang kerana tidak menghiraukan aduan penghutang penghakiman bahawa pihak-pihak di hadapan TP itu telah dinafikan hak untuk membuat penghujahan lisan atas merit permohonan penepian itu. Hakim Mahkamah Tinggi patut meneliti aduan itu, dan patut memerintahkan agar perkara itu dikembalikan kepada TP itu untuk penghujahan lisan atas merit. Oleh kerana perkara itu bermula di peringkat TP, penghutang penghakiman berhak mendapat perbicaraan penuh dan wajar di hadapan TP itu. Hak tersebut tidak patut dinafikan (lihat perenggan 32).

(4) Adalah jelas bahawa selepas surat oleh Setiausaha Tetap Kementerian Kewangan, Sabah, pemiutang penghakiman telah mengarahkan agar prosiding kebankrapan pertama tidak diteruskan dan pemiutang penghakiman telahpun mematuhi arahan Kerajaan Negeri. Selama lebih kurang tiga tahun setengah, pemiutang penghakiman tidak memulakan apa-apa prosiding kebankrapan selanjutnya terhadap penghutang penghakiman. Tingkah laku pemiutang penghakiman yang tidak meneruskan perkara kebankrapan terhadap penghutang penghakiman yang mematuhi arahan daripada Setiausaha Tetap jelas menunjukkan yang pemiutang penghakiman telah meletakkan kesudahan kepada prosiding kebankrapan terhadap penghutang penghakiman dan ini bermaksud bahawa penghutang penghakiman kini berhak melakukan urusan peribadinya sewajarnya, tanpa perlu bimbang tentang ugutan prosiding kebankrapan (lihat perenggan 35–36).]

Notes

For a case on judgment debt, see 1(1) *Mallal's Digest* (4th Ed, 2014 Reissue) para 3016.

Cases referred to

Bradford and Bingley Building Society v Seddon (Hancock (t/a Hancocks (a firm), third parties) [1999] 1 WLR 1482, CA (refd)

Hunter v Chief Constable of the West Midlands [1982] AC 529, HL (refd)

Lembaga Kemajuan Tanah Persekutuan (Felda) & Anor v Awang Soh Mamat & Ors [2010] MLJU 34; [2010] 3 CLJ 895, FC (refd)

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Legislation referred to

Bankruptcy Rules 1969 rr 18, 95, 276
Rules of the High Court 1980 O 18 r 19(1)(b), (d)

Appeal from: No 29–2691–05 of 2005 (High Court, Kuala Lumpur)

Gopal Sri Ram (Lua Ai Siew and Saraswathy Shirke Devi with him) (Soo Thein Ming & Nasrah) for the appellant/judgment debtor.
Ringo Low (Ringo Low & Assoc) for the respondent/judgment creditor.

Mohd Hishamudin JCA (delivering judgment of the court):

[1] The appeal before us emanates from the High Court of Kuala Lumpur, namely, Kuala Lumpur High Court Bankruptcy No 29–2691–05 of 2012.

[2] The appeal is by the judgment debtor against the decision of the learned High Court judge of 4 February 2013 dismissing the judgment debtor's appeal to the judge in chambers (encl 16) against the decision of the learned deputy registrar. Previously, on 24 October 2012 the deputy registrar had dismissed the judgment debtor's summons in chambers (encl 4) to set aside the bankruptcy notice dated 15 May 2012 issued against him.

[3] On 14 February 2014 we allowed the judgment debtor's appeal with costs and set aside the decision of the High Court.

[4] Our decision is unanimous.

[5] We shall now give our grounds for allowing the appeal.

[6] We begin by setting out briefly the facts of the case.

[7] The judgment creditor (the respondent in the present appeal) is a company wholly owned by the State Government of Sabah by virtue of the fact that its shareholders comprise of a company called Desa Lestari Sdn Bhd and the State Government of Sabah. Desa Lestari Sdn Bhd, in turn, is wholly owned by the State Government of Sabah. Sometime in 1984, the judgment creditor had entered into a contract with a company known as Kokomewah Sdn Bhd ('the principal debtor') for the construction of a hatchery. The judgment debtor and one Hadijah bt Harris stood as guarantors for the contract pursuant to two letters of guarantee dated 23 June 1984 and 4 April 1985, respectively. However, the contract was terminated in 1985.

[8] The judgment creditor then filed a suit in the High Court of Kota

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Kinabalu vide Kota Kinabalu Civil Suit No K-1122 of 1985 against the judgment debtor and Hadijah bt Harris, the co-guarantor. On 29 July 1998 summary judgment was entered by the Deputy Registrar of the High Court of Kota Kinabalu against the judgment debtor for the sum of RM3,700,000. The action was not pursued against the co-guarantor. The judgment debtor filed an appeal to the judge in chambers whereby the appeal was dismissed by the learned judge but the judgment sum was varied and reduced to RM2,072,046.11 on 28 August 2006.

[9] Thereafter, the judgment creditor, premised on the judgment dated 28 August 2006, took out a bankruptcy notice dated 5 December 2007 against the judgment debtor vide Kuala Lumpur High Court Bankruptcy No D7-29–3484 of 2007 ('the first bankruptcy proceedings'). The judgment debtor applied to set aside the bankruptcy notice but was unsuccessful as the application was dismissed by the deputy registrar on 26 September 2008; and the appeal to the judge in chambers was similarly dismissed on 5 November 2009.

[10] On 10 November 2008, the Permanent Secretary of the Ministry of Finance of Sabah wrote to the judgment creditor directing the judgment creditor not to proceed with the ongoing bankruptcy proceedings against the judgment debtor. The said letter from the permanent secretary is reproduced below:

Faks: 237605
Tel: 088-252692
Bil: KEW(S):100-0/2/61/1 (9)
Tarikh: 10 November 2008

KEMENTERIAN KEWANGAN
Wisma Kewangan 88593
Kota Kinabalu Sabah,
Malaysia

Puan Angeline Soh,
Acting Chief Executive Officer,
Desa Hatchery Sdn Bhd,
Level 3, West Wing,
Wisma 2020, 18 Lorong Bella,
Karamunsing,
88100 KOTA KINABALU.

BANKRUPTCY PROCEEDINGS AGAINST DATO' SERI MOHAMAD TOUFIC AL-OZEIR

Your letter ref: COR.ACEO/10(2) dated 10th November, 2008 and our telephone conversation on the 07th November, 2008 pertaining to the above refers.

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2. I have taken into consideration the intention of Desa Hatchery Sdn Bhd of having to pursue with the bankruptcy proceedings against Dato' Seri Mohamad Toufic Al-Ozeir but regret to inform you that please do not proceed with the petition. This decision was made after taking into consideration of the implications it may have on our organization overall. Thank you.

'BERKHIDMAT UNTUK NEGARA'
'JIMAT DAN PRODUKTIF'

-signed-
(Yusoff bin Datuk Hj. Mohd. Kassim, PGDK)
Permanent Secretary

[11] Pursuant thereto, the judgment creditor vide letter dated 11 November 2008, and addressed to its then solicitors, Messrs Ubing & Co, conveyed the message of the Permanent Secretary of the Ministry of Finance. The letter dated 11 November 2008 is reproduced below:

Desa Group of Companies

Ref:COR.ACEO/10(4)	BY FAX/HAND
Date: 11th November 2008	(088) 488959

Chiam Ubing & Co., UnitF3,
17A, 3rd Floor, Kompleks Asia
City, Jalan Asia City, 88000
Kota Kinabalu, Sabah.
(Attention: Mr. Ken Chiam)

Dear Sir,

RE: PETITION OF BANKRUTCY PROCEEDINGS AGAINST DATO' SRI MOHAMAD TOUFIC AL-OZEIR

Further to our letter ref. COR.ACEO/10 dated 7th November 2008 pertaining to the above subject matter, we extend herewith a copy of the instructions from Datuk Hj. Yusoff bin Datuk Hj. Mohd. Kassim, Permanent Secretary of Ministry of Finance informing Desa Hatchery Sdn Bhd not to proceed with the petition of bankruptcy proceedings against Dato' Sri Mohamad Toufic Al-Ozeir for your file.

Kindly acknowledge receipt of this letter and the enclosure.

Thank you.

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Yours faithfully,
For DESA HATCHERY SDN BHD

-signed-
(ANGELINE SOH)
Acting Chief Executive Officer
Cum
Senior General Manager (Finance/Operations)

[12] The decision not to proceed with the bankruptcy proceeding by both the State Government of Sabah and the judgment creditor was within the knowledge of the judgment debtor; and the judgment creditor knew of the judgment debtor's knowledge.

[13] Thus, no further action was taken by the judgment creditor thereafter on the bankruptcy proceedings against the judgment debtor.

[14] However, subsequently, some three and a half years later, a fresh bankruptcy notice dated 15 May 2012 ('the second bankruptcy notice') was taken out by the judgment creditor against the judgment debtor. The second bankruptcy notice was again based on the judgment of 28 August 2006.

[15] The judgment debtor then filed a summons in chambers (encl 4) to set aside the second bankruptcy notice pursuant to rr 18 and 276 of the Bankruptcy Rules 1969 and/or O 18 r 19(1)(b) and (d) Rules of the High Court 1980. The judgment creditor raised a preliminary objection against the judgment debtor's application to set aside the second bankruptcy notice, contending that the application by the judgment debtor was flawed as the application should have been made under r 95 of the Bankruptcy Rules 1969 instead of under r 18 of the same.

[16] On 15 October 2012 the learned deputy registrar heard oral submissions from both parties on the preliminary objection raised by the judgment creditor, and reserved his judgment to 24 October 2012. However, on 24 October 2012, much to the surprise of the parties, the learned deputy registrar not only decided on the preliminary objection, but proceeded to dismiss the judgment debtor's application to set aside the second bankruptcy

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notice (encl 4) without hearing it on merits.

[17] The judgment debtor filed an appeal to the judge in chambers against the decision of the learned deputy registrar in dismissing the application to set aside the second bankruptcy notice. The appeal was dismissed by the learned judge on 4 February 2013.

[18] Before the learned High Court judge, learned counsel for the judgment debtor, in her submission complained about the failure on the part of the deputy registrar to hear submissions from parties on the merits of the setting aside application. That this complaint was made is acknowledged by the learned High Court judge; for she said in her judgment (at p 220 of the supplementary appeal record):

> The Appellant's Argument
>
> The Registrar erred in law and in fact in the adjudication of the application to set aside (Enclosure 4) as he was scheduled to deliver his decision only on a Preliminary Objection (PO) raised. The JD's Counsel did not address him on merits of the Enclosure 4. It is submitted that the Learned Registrar had erred in dismissing the JD's application in Enclosure 4 based on grounds not argued before him. Having heard the PO the Registrar ought to have rule on the PO instead of addressing matters yet to be argued.

[19] However, the learned High Court judge, with respect, in her judgment did not address the complaint and only proceeded to hear the merits of the setting aside application.

[20] The appeal before us is by the judgment debtor against the decision of the learned judge dated 4 February 2013.

[21] Before us, learned counsel for the judgment debtor raised two main grounds for appeal, namely, (a) that the decision of the learned deputy registrar was seriously flawed by reason of a breach of the rules of natural justice for failing to hear the application on merits before making his decision and that the learned High Court judge should have addressed and ruled on this issue instead of glossing over it; and (b) that the second bankruptcy notice filed by the judgment creditor amounted to an abuse of process of the court since the judgment creditor had earlier made a decision not to proceed with the first bankruptcy proceedings.

[22] Learned counsel for the judgment debtor argued before us that on 24 October 2012, the learned deputy registrar was only scheduled to deliver his decision on the preliminary objection raised by the judgment creditor, as the learned deputy registrar had only heard arguments on the preliminary

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objection. Instead, the learned deputy registrar decided not only on the preliminary objection but also on the summons in chambers (encl 4) on the setting aside of the second bankruptcy notice. This was done despite the fact that parties had not submitted before the learned deputy registrar on the application for setting aside the second bankruptcy notice. In short, the judgment debtor's complaint is that he was not accorded the right to be heard on the application to set aside the second bankruptcy notice.

[23] In deciding on the application to set aside the second bankruptcy notice without according the parties an opportunity to argue on its merits, the judgment debtor contends that the learned deputy registrar had acted in breach of rules of natural justice and as such the decision by the learned deputy registrar on the application to set aside the bankruptcy notice is a nullity and is liable to be set aside.

[24] Learned counsel for the judgment creditor on the other hand contended that the judgment debtor's right to be heard has not been breached, for the judgment debtor had filed two written submissions before the learned deputy registrar on the application to set aside the second bankruptcy notice. That being the case, the judgment debtor is deemed to have argued his case before the learned deputy registrar.

[25] Further, it is the contention of the judgment creditor that even if the judgment debtor was not accorded the right to ventilate his arguments before the learned deputy registrar, this omission or denial was cured by the fact that the judgment debtor had argued on the merits of the application before the learned judge on appeal.

[26] Since an appeal before the judge is by way of a re-hearing, the judgment debtor had been accorded ample opportunity to submit. That being the case, there has not been a breach of rules of natural justice in the hearing of the application of the judgment debtor to set aside the second bankruptcy notice.

[27] With due respect, we are unable to agree with the submission of learned counsel for the judgment creditor. We find that the failure on the part of the learned deputy registrar to accord parties the right to be heard before him amounts to a fundamental breach of rules of natural justice. The hearing of the application to set aside the second bankruptcy notice before the learned deputy registrar is procedurally flawed as the learned deputy registrar should have allowed learned counsel for the judgment debtor to submit orally, despite the fact that parties had filed their written submissions. It is the rule of law that parties in a court proceedings have the right to be heard before a deliberation is made.

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[28] We are of the opinion that even when written submissions have been filed, the judgment debtor still has a right to be heard orally. This is a fundamental right of the rule of law and cannot be denied to the judgment debtor. The learned deputy registrar had failed to allow the judgment debtor the right to submit orally despite the fact that the judgment debtor had written two letters to the High Court seeking an oral hearing before the setting aside application was decided. However, it is sad to note that the learned deputy registrar failed to respond to any of the said two letters. Instead, without hearing arguments by either party, the learned deputy registrar proceeded to deliver his decision on the application to set aside the second bankruptcy notice. The learned deputy registrar's action amounts to a gross procedurally impropriety and a blatant disregard of the rules.

[29] Moreover, we find that since the learned deputy registrar had reserved 24 October 2012 for decision on the preliminary issue only, the learned deputy registrar should have confined his decision on the preliminary issue only. In deciding on the application to set aside the second bankruptcy notice without hearing the merits of the application, the learned deputy registrar had committed a serious miscarriage of justice. In this respect, we refer to the Federal Court decision of *Lembaga Kemajuan Tanah Persekutuan (Felda) & Anor v Awang Soh Mamat & Ors* [2010] MLJU 34; [2010] 3 CLJ 895, in which Gopal Sri Ram FCJ held (at p 901 of the judgment):

> According to the applicants, the Court of Appeal dismissed this appeal without hearing argument on it. This, at first blush, is a serious complaint. It is contrary to procedural fairness for a court to adjudge an appeal against the appellant without hearing arguments.

[30] Guided by the above passage of the judgment, we therefore find the decision of the learned deputy registrar on the application to set aside the second bankruptcy notice as procedurally flawed and must be set aside.

[31] We also wish to add that, with due respect, we are unable to agree with the argument by learned counsel for the judgment creditor that the failure of the learned deputy registrar to accord an oral hearing to the judgment debtor is curable as the appeal before the judge is by way of a re-hearing. Whilst we agree that the appeal before the judge is by way of a re-hearing, it does not mean that there need not be a hearing before the learned deputy registrar. To deny the parties the right to argue before the learned deputy registrar would in essence mean that the parties would be deprived of one level of hearing before the court. Such a practice is procedurally flawed and cannot be condoned by this court.

[32] In our judgment, the learned High Court judge erred in law in ignoring the complaint of learned counsel for the judgment debtor that the parties

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before the deputy registrar were denied the right to make oral submissions on the merits of the setting aside application. The learned High Court judge should have entertained the complaint, and should have ordered that the matter be sent back to the deputy registrar for oral submission on the merits. Since the matter began at the deputy registrar's level, the judgment debtor was entitled to a full and proper hearing before the deputy registrar. Such a right should not have been denied.

[33] The second issue raised by learned counsel for the judgment debtor before us is that the judgment creditor had abused the process of the court by re-initiating bankruptcy proceedings against the judgment debtor after having discontinued the same in compliance with the instruction from the Permanent Secretary of the Ministry of Finance, Sabah.

[34] Learned counsel for the judgment creditor, however, argued that since there was a valid judgment against the judgment debtor, and since the judgment remained unsatisfied, the judgment creditor was entitled to continue bankruptcy proceedings against the judgment debtor. It was further argued by counsel for the judgment creditor that the letter by the Permanent Secretary of the Ministry of Finance, Sabah, was merely a request and cannot be considered as an instruction from the State Government of Sabah.

[35] With due respect, we are unable to agree with learned counsel for the judgment creditor. On the facts, it is clear that after the letter by the Permanent Secretary of the Ministry of Finance, Sabah, on 10 November 2008, the judgment creditor had instructed that the first bankruptcy proceedings be discontinued and the judgment creditor had duly complied with the state government's instruction. Thereafter, for almost three and a half years, the judgment creditor did not initiate any further bankruptcy proceedings against the judgment debtor.

[36] In our judgment, the conduct of the judgment creditor in not proceeding with the bankruptcy matter against the judgment debtor in compliance with the instruction from the permanent secretary is a clear indication by the judgment creditor that it had put a finality to the bankruptcy proceedings against the judgment debtor and this means that the judgment debtor is now entitled to conduct his personal affairs accordingly, without having to worry of the threat of the bankruptcy proceedings.

[37] In our judgment, in the light of these facts, the conduct of the judgment creditor in initiating a fresh bankruptcy proceedings against the judgment debtor based on the very same judgment of 28 August 2006, some three and a half years later, amounts to an abuse of process of the court. In this regard, we refer to the dictum of Lord Bingham of Cornhill in the House of Lords case of

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Hunter v Chief Constable of the West Midlands [1982] AC 529 where it was said:

> But *Henderson v Henderson* abuse of process, as now understood, although separate and distinct from cause of action estoppel and issue estoppel, has much in common with them. The underlying public interest is the same: that there should be finality in litigation and that a party should not twice be vexed in the same matter. This public interest is reinforced by the current emphasis on efficiency and economy in the conduct of litigation, in the interests of the parties and the public as a whole.

[38] Further, in *Bradford and Bingley Building Society v Seddon (Hancock (t/a Hancocks (a firm), third parties)* [1999] 1 WLR 1482 Auld LJ held (at p 1490):

> In my judgment, it is important to distinguish clearly between res judicata and abuse of process not qualifying as res judicata ... The former, in its cause of action estoppel form, is an absolute bar to relitigation, and in its issue estoppel form also, save in 'special cases' or 'special circumstances' ... The latter, which may arise where there is no cause of action or issue estoppel, is not subject to the same test, the task of the court being to draw the balance between the competing claims of one party to put his case before the court and of the other not to be unjustly hounded given the earlier history of the matter.

[39] Based on the reasons above, we therefore allow the appeal with costs of RM10,000 in favour of the judgment debtor for the court here and below.

Appeal allowed with costs of RM10,000.

Reported by Afiq Mohamad Noor